

**COURT OF APPEALS
DECISION
DATED AND RELEASED**

December 3, 1996

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See § 808.10 and RULE 809.62, STATS.

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-2909

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

In re the Marriage of:

Linda LaBerge,

Petitioner-Appellant,

v.

Arthur LaBerge,

Respondent-Respondent.

APPEAL from an order of the circuit court for Milwaukee County:
PATRICIA S. CURLEY, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Schudson, JJ.

PER CURIAM. Linda LaBerge appeals from an order granting her ex-husband, Arthur LaBerge's petition for a modification of physical placement of their two children. Linda argues that the wrong standard was applied ("the best interest of the child" standard instead of the "the harm" standard) in granting the petition and that the record is insufficient to support

the trial court's conclusion that the present custodial conditions are harmful to the children. Because the trial court applied the correct legal standard, and because there is sufficient substantial evidence to support the trial court's ruling modifying physical placement, we affirm.

I. BACKGROUND

The LaBerges were divorced on March 4, 1994. Primary physical placement of the two minor children was awarded to Linda. Shortly after the divorce, Arthur learned that George Salinas, Linda's boyfriend, was caring for the children when Linda went to work. Arthur became concerned when he learned that Salinas had a domestic violence injunction against him from Salinas's estranged wife, Janice. He felt the children were distressed under Salinas's care and brought a motion in August 1994 to modify primary placement.

After hearing the evidence, the trial court ordered that primary placement of the children be transferred to Arthur. Linda now appeals.

II. DISCUSSION

When reviewing modifications under § 767.325, STATS., we will affirm the trial court unless it erroneously exercised its discretion. *Stephanie R.N. v. Wendy L.D.*, 174 Wis.2d 745, 765, 498 N.W.2d 235, 241 (1993). Where the trial court considered the relevant facts, applied the proper legal standard and reached a reasonable conclusion, we will not find an erroneous exercise of discretion. *Id.* at 766, 498 N.W.2d at 242. After reviewing the record in this case, we conclude that the trial court did not erroneously exercise its discretion.

In order for a trial court to modify a placement order within two years of the initial order, the party seeking modification must show “by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child.” Section 767.325(1)(a), STATS. This legal standard is referred to as the harm standard. It is clear from the record that the trial court applied this standard in reaching its conclusion. The trial court stated in pertinent part:

First of all, I think the standard has been well spelled out by all three attorneys. That for this Court to change placement in this particular case has to be shown by substantial evidence that the modification is necessary because the current custodial conditions are physically or emotionally harmful to the best interest of the child and it is, as we have said, a higher standard than if this were just a straight best interest of the children situation; and I think there were good reasons why the legislature imposed this higher standard for a period of two years, to give children some consistency for a while after the tumult of a divorce between the parents.

The trial court proceeded to examine the relevant facts in light of this standard and eventually determined that living with Linda—*because of Salinas's presence, conduct and history*—rendered the current custodial conditions physically or emotionally harmful to the best interest of the LaBerge children. There is sufficient substantial evidence in the record to support this ruling.

There is evidence that Salinas has been violent in the past, has demonstrated explosive behavior, has had past problems with drugs and the law, and that the children seem fearful and distressed because of Salinas's conduct. The trial court based its findings on its observations of all the parties involved and relied on the reports of two mental health professionals who spoke with the children.

Linda argues that the trial court did not make adequate findings and that there is evidence in the record contradicting the evidence regarding Salinas's explosive temper and history of violence. Although there is some evidence in the record that attests to Salinas being a good and loving caretaker, it is not the job of this court to make credibility determinations. This is left to the trial court, which is in a better position to observe demeanor of the witnesses. *Gehr v. City of Sheboygan*, 81 Wis.2d 117, 122, 260 N.W.2d 30, 33 (1977). It is up to the trial court to determine what weight to give each witness's testimony. *Milbauer v. Transport Employes' Mut. Benefit Soc'y*, 56 Wis.2d 860, 865, 203 N.W.2d 135, 138 (1973).

Here, the trial court concluded that the evidence attesting to Salinas's explosiveness and violent character was more credible than the testimony attesting otherwise. In addition, it is not the job of this court to search the record to determine whether there is support for findings different from those reached by the trial court, but to search the record to determine if it supports the findings that the trial court did make. We have done so and conclude that the record supports the trial court's findings regarding Salinas's temper, potential for violence, and past history with drug abuse.

Psychologist Kathleen Schoendorf testified that Salinas showed “a high degree of anger, a high potential for explosive angry behavior and hostility” and that his test results indicated that he can be very explosive, very violent. Janice, Salinas's ex-wife, testified that Salinas drank a lot of alcohol, that he was angry and violent and that both she and her children feared him. She also stated that he fought with the children, actually threw objects at them, slept with a knife under his pillow and whacked the family dog in the head with a baseball bat. Janice also said that Salinas threatened her not to testify. Arthur LaBerge attested that when he went to pick up the children on one occasion, he found Linda and Salinas had been drinking—that they were drunk. There is also evidence, namely the mental health professionals' conclusions, to support

the trial court's findings that the children are evincing distress under Salinas's care.

The trial court's conclusion, that the harm standard had been met and that the children's physical placement should be transferred, was a reasonable one in light of the facts referenced above. Accordingly, we do not find an erroneous exercise of discretion and affirm the trial court.¹

By the Court. – Order affirmed.

This opinion will not be published. See RULE 809.23(1)(b)5, STATS.

¹ Linda also claims the trial court considered irrelevant information in reaching its decision. Because there is sufficient relevant evidence in the record to support the trial court's determination, we need not consider this additional argument. See *Gross v. Hoffman*, 227 Wis. 296, 300, 277 N.W. 663, 665 (1938) (only dispositive issue need be addressed).